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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL SILVA CORTEZ,

Defendant and Appellant.

F069836

(Super. Ct. No. F13904202)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Brant K. Bramer, Commissioner.

Law Office of Hristo Bijev and Hristo Bijev for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Poochigian, Acting P.J., Franson, J. and Peña, J.

## **INTRODUCTION**

Appellant Miguel Silva Cortez pled no contest to felony child abuse pursuant to a plea agreement. Cortez was sentenced to the upper term of six years in state prison. The trial court suspended execution of the sentence and placed Cortez on formal probation for a period of four years, subject to various terms and conditions including that he serve 365 days in jail. Cortez contends imposing a term of six years in prison and requiring him to serve 365 days in jail violates Penal Code<sup>1</sup> sections 273d, subdivision (a), and 1170, subdivision (b). Cortez also contends his sentence violates his plea agreement. We reject his contentions and affirm.

## **FACTUAL AND PROCEDURAL SUMMARY**

On May 13, 2013, a complaint was filed in Fresno County Superior Court charging Cortez with felony child abuse. On June 28, 2013, Cortez pled no contest to a violation of section 273d, subdivision (a), felony child abuse, pursuant to a plea agreement. In exchange for his plea to the felony child abuse charge, two misdemeanor cases pending against Cortez would be dismissed and the district attorney's office was agreeing to a two-year "lid" on the felony charge. The trial court found a factual basis for the plea; that Cortez freely and voluntarily waived his constitutional rights; and that he understood the consequences of the plea and entered into the plea knowingly and intelligently.

A probation report was prepared. The report indicates that Cortez became angry when his youngest daughter did not immediately help him insert a movie into his computer, stating she was busy cleaning her bedroom. Cortez grabbed the girl by the neck, choked the child until she felt faint, and dragged her from her bedroom into the hallway by the neck. When Cortez released her, the child ran outside to her older sister, who called 911. The probation report also noted that Cortez had a prior record of

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<sup>1</sup> References to code sections are to the Penal Code unless otherwise specified.

offenses, including a conviction for willful cruelty to a child in 2010. As a result of that conviction, Cortez had been ordered to attend parenting classes. Cortez was on two conditional sentences at the time he committed the current felony. The probation officer recommended that probation be denied and that Cortez be sentenced to a term of two years.

At the August 9, 2013, sentencing hearing, Cortez asked that he receive probation. Cortez indicated he had an alcohol problem and was willing to enter a treatment program, which also included anger management. The People opposed this request, noting that Cortez previously had been ordered to attend anger management and parenting classes, but failed to comply.

The trial court indicated it was not willing to grant probation. The trial court stated it had a probation report recommending prison, the People recommending prison, and Cortez blaming the victim for “mouthing [him]” and stating that alcohol had not been a factor in the commission of the offense. The trial court indicated it would impose the minimum two-year prison term, or it would continue the matter and allow Cortez to be reinterviewed.

At the continued sentencing hearing, probation and the People were still urging a two-year prison term. The trial court indicated it was inclined to agree with that recommendation, but if it imposed probation with conditions, it would be setting a term of six years if there was any violation of probation. The trial court asked if Cortez wanted to be sentenced to prison for the two-year minimum term, or receive probation with conditions that if violated, would result in a sentence of six years in prison; Cortez asked for probation.

The trial court stated it would place Cortez on probation for four years, with various terms and conditions, including that Cortez immediately submit to an inpatient treatment program. The trial court proceeded to sentence Cortez to a term of six years in prison, stayed; placed on probation with the condition he serve 365 days in custody,

against which he had 244 days of time credits; and the balance of the jail time would be suspended contingent upon immediate enrollment and placement in an inpatient treatment program. The trial court asked Cortez if he understood and accepted all of these terms of probation, to which Cortez responded affirmatively.

On June 4, 2014, Cortez filed a petition for writ of error coram nobis. The petition asked that he be allowed to withdraw his plea because he had not been advised of the immigration consequences of his plea and the sentence imposed was in excess of the lid agreed to in the plea agreement.

On June 20, 2014, the trial court heard argument on Cortez's petition for writ of error coram nobis. The People noted that the sentence imposed on Cortez was the one he agreed to when offered the option of the two-year lid in prison, or the six-year stayed term with four years of probation and specified conditions. The trial court stated that the transcript of the plea hearing specifically included the exchange where the trial court had notified Cortez of the immigration consequences of his plea and Cortez acknowledged he understood. The trial court also noted that the sentence imposed on Cortez had been the sentence to which Cortez affirmatively agreed, rather than the two-year prison sentence originally contemplated at the time of entry of the plea. The trial court denied the petition.

On June 27, 2014, Cortez filed a notice of appeal in which he challenged the validity of his plea. The trial court denied the request for a certificate of probable cause. On August 11, 2014, this court deemed the appeal operable to the extent Cortez wished to challenge the sentence or other matters that do not affect the validity of the plea.

### **DISCUSSION**

Cortez contends he cannot be sentenced to prison and jail time as part of the same sentence. He also contends the trial court abused its discretion by imposing a "harsher sentence" than agreed upon in the plea agreement.

## I. PLEA AGREEMENT TERMS

Cortez contends his sentence violates his plea agreement. We disagree.

Cortez pled to the felony child abuse charge pursuant to a plea agreement, which specified that he would receive a two-year prison sentence for the offense. At sentencing, the trial court imposed a term of six years in prison, stayed, and placed Cortez on four years' probation subject to terms and conditions. This sentence was imposed because Cortez asked to be placed on probation, rather than be sentenced to the two-year prison term called for in the plea agreement. The trial court acquiesced to this request, but required Cortez to agree to other terms in consideration of receiving probation.

At the August 9, 2013 sentencing hearing, Cortez asked that he receive probation. Cortez indicated he had an alcohol problem and was willing to enter a treatment program, which also included anger management. The trial court indicated it was not willing to grant probation. The trial court stated it had a probation report recommending prison, the People recommending prison, and Cortez blaming the victim for "mouthing [him]" and stating that alcohol had not been a factor in the commission of the offense. The trial court indicated it would impose the minimum two-year prison term, or it would continue the matter and allow Cortez to be reinterviewed.

At the continued sentencing hearing, probation and the People were still urging a two-year prison term. The trial court indicated it was inclined to agree with that recommendation, but if it imposed probation with conditions, it would be setting a term of six years in prison if there was any violation of probation. The trial court asked if Cortez wanted to be sentenced to prison for the two-year minimum term as called for in the plea agreement, or receive probation with conditions that if violated, would result in a sentence of six years in prison; Cortez asked for probation.

The trial court stated it would place Cortez on probation for four years, with various terms and conditions, including that Cortez immediately submit to an inpatient treatment program. The trial court proceeded to sentence Cortez to a term of six years in

prison, stayed; placed on probation with the condition he serve 365 days in custody, against which he had 244 days of time credits; and the balance of the jail time would be suspended contingent upon immediate enrollment and placement in an inpatient treatment program. The trial court asked Cortez if he understood and accepted all of these terms of probation, to which Cortez responded affirmatively.

The sentence does not violate Cortez's plea agreement because he affirmatively agreed to the terms of probation. In *People v. Martin* (2010) 51 Cal.4th 75, the defendant asserted that the sentence was not in conformance with his plea agreement; the trial court imposed probation conditions that the defendant contended were improper because they were not a part of the plea agreement and arose out of a dismissed charge. In *Martin*, the trial court stated it would reject the plea bargain unless the defendant consented to certain probation conditions; the defendant affirmatively consented. (*Id.* at p. 82.) The California Supreme Court held that when a defendant expressly agrees to a condition of probation, even if not contemplated by plea agreement, the condition is validly imposed. (*Ibid.*)

Here, Cortez was given the option of having the benefit of his plea bargain, a sentence of two years in prison, or receiving a term of probation with specified terms and conditions. Cortez affirmatively requested probation and affirmatively accepted the terms of probation, which included a possible six-year prison term if he violated probation. As in *Martin*, having affirmatively requested probation and expressly accepted the terms of probation, Cortez cannot now challenge those very terms he accepted. (*People v. Martin, supra*, 51 Cal.4th at p. 82.)

As for the failure to grant the petition for writ of error coram nobis, Cortez asked at the hearing on the petition that the trial court deny the writ. Specifically, Cortez's counsel stated: "It was our understanding the Court sentenced him to four years on probation.... [I]f that was the Court's order, the four years' probation, and if he violates probation and got time he will be sentenced to prison.... And the Court's order is

absolutely for sentencing is accurate. So if that's the case, the Court should deny the writ."

The trial court did not abuse its discretion in denying the writ, as Cortez acknowledged in the trial court the writ should be denied. Additionally, Cortez was advised of the immigration consequences of entering his plea. Furthermore, the terms of probation imposed by the trial court were not a basis for granting the writ, as Cortez had expressly agreed to those conditions. (*People v. Martin, supra*, 51 Cal.4th at p. 82.)

A plea agreement requires both the defendant and the People to abide by the bargain. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 635.) The terms of the plea agreement were set forth in the written agreement and at the change of plea hearing. At the continued sentencing hearing, it was Cortez who requested a change to the terms of the agreement; that he be given probation instead of a prison term. As to each condition that would be imposed if probation were to be granted, the trial court specifically asked if Cortez agreed and Cortez affirmatively responded each time that he agreed to the terms. The trial court cannot, and did not, modify the terms of the plea agreement without Cortez's consent; the modification was at Cortez's specific request. (*People v. Segura* (2008) 44 Cal.4th 921, 931.)

Any failure or error to advise Cortez of the right to withdraw a plea is of no consequence, because the superior court did not disapprove the plea agreement. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1223.) It was the defendant, Cortez, who repudiated the agreement and requested a sentence of probation instead of prison as specified in the plea agreement. (*People v. Alexander* (2015) 233 Cal.App.4th 313, 318.)

## II. PRISON AND JAIL TIME

Cortez was sentenced to the upper term of six years in state prison. The trial court suspended execution of the sentence and placed Cortez on formal probation for a period of four years, subject to various terms and conditions including that he serve 365 days in jail. Cortez contends imposing a term of six years in prison and requiring him to serve

365 days in jail violates sections 273d, subdivision (a), and 1170, subdivision (b). He is mistaken.

Penal Code section 273d, subdivision (a) is the offense to which Cortez pled and provides that a conviction under this code section “shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, four, or six years, or in a county jail for not more than one year, by a fine of up to six thousand dollars (\$6,000), or by both that imprisonment and fine.” Section 1170, subdivision (h)(4) provides: “Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.” Section 1203.1, subdivision (a) provides that the trial court:

“in the order granting probation, may suspend the imposing or the execution of the sentence and may direct that the suspension may continue for a period of time not exceeding the maximum possible term of the sentence, except as hereinafter set forth, and upon those terms and conditions as it shall determine. The court, or judge thereof, in the order granting probation and as a condition thereof, may imprison the defendant in a county jail for a period not exceeding the maximum time fixed by law in the case.”

Despite Cortez’s contention, the trial court’s imposition of a prison term, suspended pending completion of probation, combined with imposition of a jail term as a condition of probation, was in full compliance with the provisions of section 1203.1, subdivision (a), which is incorporated in section 1170, subdivision (h)(4).

Cortez’s sentence comports with section 1203.1, subdivision (a) and section 1170, subdivision (h)(4), and is a proper exercise of the trial court’s discretion to set terms of probation. (*People v. Hodgkin* (1987) 194 Cal.App.3d 795, 801-802.)

### **DISPOSITION**

The judgment is affirmed.